

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ATLANTIC SPECIALTY INSURANCE COMPANY, a New York company; MARKEL AMERICAN INSURANCE COMPANY, a Virginia corporation,

No. 2:21-cv-1244

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs,

VS.

MATT GODDEN, an individual; HARLEY FRANCO, an individual; HMS PARTNERS, LLC, a Washington Limited Liability Company,

Defendants.

Plaintiffs Atlantic Specialty Insurance Company (“Atlantic Specialty”) and Markel American Insurance Company (“MAIC”) allege as follows:

J. NATURE OF THE ACTION

1. Plaintiffs Atlantic Specialty and MAIC seek a declaratory judgment that Atlantic
Specialty does not have a duty to defend and pay loss to Matt Godden in relation to certain claims
in the action captioned *Harley Franco, et al. v. Macquarie Capital (USA) Inc., et al.*, Case No. 18-
2-16360-9 SEA (King County Superior Court, Washington) (hereafter “2018 Action”).

11

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Complaint for Declaratory Judgment – 1

FORSBERG & UMLAUF, P.S.
ATTORNEYS AT LAW
901 FIFTH AVENUE • SUITE 1400
SEATTLE, WASHINGTON 98164
(206) 689-8500 • (206) 689-8501 FAX

II. PARTIES

1. Plaintiff Atlantic Specialty is a New York company, with its principal place of business in Minnesota. At all relevant times, Atlantic Specialty is, and was, authorized to conduct business in the state of Washington.

2. Plaintiff Markel American Insurance Company is a Virginia corporation with its principal place of business and center of operations at 4521 Highwoods Parkway, Glen Allen, Virginia 23060, which is authorized to conduct business in the State of Washington.

3. Upon information and belief, defendant Matt Godden is an individual residing in King County, Washington.

4. Upon information and belief, defendant Harley Franco (“Franco”) is an individual residing in King County, Washington.

5. Upon information and belief, defendant HMS Partners, LLC (“HMS Partners”) is a Washington Limited Liability Company, with its principal place of business in Washington. Upon information and belief, Franco is the sole member of HMS Partners.

III. JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 28 U.S.C. §1332(a)(1), 2201, and 2202. There is complete diversity between the plaintiffs and the defendants, and the amount in controversy exceeds the sum of \$75,000, exclusive of interest and costs.

2. An actual controversy within the meaning of 28 U.S.C. §2201 exists between the parties regarding their respective rights, duties, and obligations under the policy issued by Atlantic Specialty.

3. Venue is proper pursuant to 28 U.S.C §1391, because the defendants reside in this district, a substantial portion of the events giving rise to the claim at issue in this action occurred

1 in this district, and the relevant insurance policies were issued in this district.

2 **IV. GENERAL ALLEGATIONS**

3 **A. The Underlying Actions**

4 1. In 2018, Franco and HMS Partners filed the 2018 Action against Godden, and eight
 5 other defendants: (1) Macquarie Capital (USA) Inc.; (2) Macquarie Marine Services, LLC; (3)
 6 MIHI, LLC; (4) Tobias Bachteler, an individual; (5) HMS Holdings 1, LLC; (6) HMS Holdings
 7 2, LLC; (7) HMS Holdings 3, LLC US; and (8) Harley Marine Services, Inc. (“HMS”).

8 2. Franco and HMS Partners alleged in the Underlying Action that Franco is the
 9 founder and Chief Executive Officer of HMS, and that he is a member and the Chairman of HMS’
 10 Board of Directors. Franco and HMS Partners further alleged that Godden is the Chief Operating
 11 Officer and interim CEO of HMS, and that Godden is a former member of HMS’ Board of
 12 Directors. In addition, Franco and HMS Partners alleged that Tobias Bachteler (“Bachteler”) is
 13 the Co-Head Principal of the Transactions Group and a Managing Director of Macquarie Capital
 14 (USA) Inc., and that Bachteler is a member of HMS’ Board of Directors.

15 3. Franco and HMS Partners further alleged that Franco and Macquarie Marine
 16 Services, LLC and/or Macquarie Capital (USA) Inc. (together, “Macquarie”) own HMS through
 17 three holding companies: HMS Holdings 1, LLC (“HMS Holdings 1”), HMS Holdings 2, LLC
 18 (“HMS Holdings 2”), and HMS Holdings 3, LLC US (“HMS Holdings 3”). In addition, Franco
 19 and HMS Partners alleged that Franco holds ownership of HMS Holdings 3 through HMS Partners.
 20 Furthermore, Franco and HMS Partners alleged that MIHI, LLC is a financial advisor to HMS.
 21 Franco allegedly holds majority ownership of HMS through the various holding companies.

22 4. Furthermore, Franco and HMS Partners alleged that, in or around 2015, Macquarie
 23 improperly provided a high interest rate loan to HMS (the “PIK Loan”), and that Macquarie did

1 not fulfill its promise refinance the PIK Loan at a lower rate of interest.

2 5. Franco and HMS Partners further alleged that, between approximately 2008 and
3 mid-November 2018, HMS' Board of Directors was comprised of four individuals: two members
4 selected by Franco, one member was selected by Macquarie (Bachteler), and one independent
5 member (Godden). Franco and HMS Partners alleged that Godden was not in fact independent,
6 and instead, served the interests of Macquarie. In mid-November 2018, Godden allegedly resigned
7 as a board member.

8 6. In addition, Franco and HMS Partners alleged that Franco refused to approve
9 Macquarie's requests to sell HMS or make an initial public offering of HMS' stock. As a result,
10 according to Franco and HMS Partners, in or around July 2018, Godden and Bachteler held a
11 purported meeting of the Board or Directors and voted to replace Franco with Godden as CEO of
12 HMS. Franco and HMS Partners contend that this meeting was in violation of certain "written
13 documents and applicable law." Godden then allegedly cut-off Franco's email and phone access
14 at HMS, which allegedly caused damage, personal embarrassment, and emotional distress to
15 Franco, and additional damage to HMS.

16 7. Franco and HMS Partners alleged that the Godden and Bachteler based their
17 decision to replace Franco on a forensic accounting created on behalf of Macquarie.

18 8. In addition, Franco and HMS Partners alleged that the Godden's actions interfered
19 with the sale and construction of boats owned and/or being built by third parties in which Franco
20 has a majority interest.

21 9. Franco and HMS Partners alleged six causes of action against Godden in the 2018
22 Action.

23 10. In their "First Cause of Action" for Breach of Fiduciary Duty, Franco and HMS

1 Partners alleged that Godden breached his fiduciary duties to them, by engaging in acts of self-
2 dealing, and by putting Godden's own financial interests above the interests of Franco and HMS
3 Partners. Specifically, Godden allegedly disseminated false allegations of embezzlement against
4 Franco, attempted to oust Franco from his position as President and CEO, effected a transaction
5 with HMS on the PIK Loan, and failed to vote to allow HMS to hire lawyers to defend an action
6 to foreclose on the PIK Loan.

7 11. In their "Second Cause of Action" for Breach of Contract, Franco and HMS
8 Partners alleged that Godden, by improperly attempting to oust Franco from his position as CEO
9 and President of HMS, breached: (a) the LLC agreements of HMS Holdings 1, HMS Holdings 2,
10 and HMS Holdings 3; and (b) the HMS Bylaws.

11 12. In their "Third Cause of Action" for Interference with Contractual Relations,
12 Franco and HMS Partners alleged that Godden wrongfully and tortiously interfered with business
13 and existing contractual relationships, including but not limited to, Franco's employment contract
14 with HMS.

15 13. In their "Fourth Cause of Action" for Intentional Infliction of Emotional Distress,
16 Franco and HMS Partners alleged that Godden intentionally and/or recklessly inflicted emotional
17 distress on Franco by engaging in extreme and outrageous conduct.

18 14. In their "Fifth Cause of Action" for Defamation, Franco and HMS Partners alleged
19 that Godden made false and defamatory statements and communications about Franco, including
20 but not limited to, statements and communications that Franco embezzled from HMS.

21 15. In their "Sixth Cause of Action" for Declaratory Judgment, Franco and HMS
22 Partners sought a judicial declaration that: (a) Macquarie is irrevocably conflicted, because it has
23 an improper self-interest in forcing a sale of HMS; (b) Bachteler is irrevocably conflicted, and

1 cannot vote on any matters relating to Franco's role at HMS (and its holding companies); and (c)
2 because of conflicts of interest, any and all corporate governance actions and changes, including
3 but not limited to, the replacement of Franco as CEO, must be approved by a majority of the equity
4 holders of HMS (and its holding companies).

5 **B. The Policy Issued by Atlantic Specialty and Tender by Godden**

6 16. Atlantic Specialty issued the following Private Company Management Liability
7 Policy to HMS Holdings 3 LLC: Policy No. MML-09899-18 (02/20/18 – 02/20/19) (the “Policy”).
8 The Policy contains a Directors, Officers & Organization Liability (“D&O”) coverage section and
9 an Employment Practices Liability (“EPL”) coverage section, among others.

10 17. The Policy contains an endorsement, which provides in part:

11 ADDITIONAL ORGANIZATION ENDORSEMENT

12 In consideration of the premium charged, the term “Organization,”
13 as defined in Section II DEFINITIONS of the General Terms and
Conditions Section, is amended to include the following entity(ies):

14 HMS Holdings 2 LLC

15 HMS Holdings 1 LLC

16 Harley Marine Services Inc. . . .

17 18. The D&O coverage section of the Policy provides in part:

18 I. INSURING AGREEMENTS

19 (A) Insured Person Non-Indemnified Loss Coverage:

20 The Underwriter will pay, on behalf of an Insured Person,
21 Loss for which an Insured Person is not
22 indemnified by the Organization from any Insured Person
23 Person Claim first made against an Insured Person
during the Policy Period or applicable Extended
Reporting Period for a Wrongful Act . . .

VI. DEFENSE AND SETTLEMENT

- (A) The Underwriter will have the right and duty to defend any Claim covered under this Coverage Section through counsel of its choice, even if the allegations of such Claim are groundless, false, or fraudulent; provided, that the Underwriter's obligation to defend any Claim covered under this Coverage Section is subject to the applicable Retention and the Underwriter's applicable Limits of Liability stated in ITEM 4 of the Declarations
- (C) The Underwriter will have no obligation to pay Loss, or to defend or continue to defend any Claim, after the Underwriter's applicable Limits of Liability have been exhausted by the payment of Loss.

19. The D&O coverage section of the Policy contains exclusions to coverage, including the following:

III. EXCLUSIONS

(A) This Coverage Section does not apply to, and no coverage will be available under this Coverage Section for, Loss from any Claim:

(3) brought by or on behalf of the Organization or any Insured Person;

provided, that this EXCLUSION (A)(3) shall not apply to:

(h) any Claim brought or maintained as a result of the solicitation, assistance, active participation or intervention of an Insured Person where such solicitation, assistance, active participation or intervention is protected under 18 U.S.C. 1514A (“whistleblower” protection provided under the Sarbanes-Oxley Act of 2002) or any similar “whistleblower” protection provision of any federal, state or local statute, ordinance, regulation or common law

(7) based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any actual or alleged bodily injury (other than mental anguish or emotional distress), sickness, disease or death of any person, libel, slander, defamation of character, invasion of privacy or damage to or destruction of any tangible property including loss of use thereof whether or not it is damaged or destroyed

(11) made against any Insured based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving:

(a) such Insured having gained any profit, remuneration or advantage to which such Insured is not legally entitled; or

(b) the committing of any deliberately fraudulent or dishonest act or omission, or any willful violation of any statute, rule or law, by such Insured;

provided, that this EXCLUSION (A)(11) shall not apply unless the gaining by such Insured of such profit, remuneration or advantage to which such Insured is not legally entitled, or the deliberately fraudulent or dishonest act or omission or willful violation of statute, rule or law, has been established by a final adjudication in any judicial or administrative proceeding other than an action or proceeding commenced by the Underwriter to determine coverage under this Policy

(16) for any employment-related Wrongful Act . . .

1

20. The D&O coverage section of the Policy contains provisions relating to allocation

1 and other insurance, including the following:

2 VII. ALLOCATION

3 If both Loss covered by this Coverage Section and loss not
4 covered by this Coverage Section are incurred, either
5 because a Claim made against the Insureds includes both
6 covered and uncovered matters, or because a Claim is made
7 against both Insureds and others not included within the
8 definition of "Insured" set forth in DEFINITION (E) above,
9 then such covered Loss and uncovered loss shall be allocated
10 as follows:

11 (A) one hundred percent (100%) of Defense Expenses
12 incurred by the Insureds in connection with such
13 Claim shall be allocated to covered Loss; and
14
15 (B) all loss, other than Defense Expenses, incurred by the
16 Insureds in connection with such Claim shall be
17 allocated between covered Loss and uncovered loss
18 based upon the relative legal and financial exposures
19 of, and relative benefits obtained in connection with
20 the defense and/or settlement of the Claim by the
21 Insured Persons, the Organization and others. In
22 making such a determination, the Organization, the
23 Insured Persons and the Underwriter agree to use
24 their best efforts to determine a fair and proper
25 allocation of all such amounts. In the event that the
26 Underwriter and the Insureds do not reach an
27 agreement with respect to an allocation, then the
28 Underwriter shall be obligated to make an interim
29 payment of the amount of Loss which the parties
30 agree is not in dispute until a final amount is agreed
31 upon or determined pursuant to the provisions of this
32 Policy and applicable law

33 IX. OTHER INSURANCE

34 This Coverage Section is specifically excess of and will not
35 contribute with:

36 (A) any other valid and collectible insurance available to
37 any Insured, including but not limited to any
38 insurance under which there is a duty to defend,
39 unless such other insurance is written specifically in

1 excess of this Policy; or

2 (B) any indemnification to which any Insured Person is
3 entitled from any entity other than the Organization.

4 21. The D&O and EPL coverage sections of the Policy contain a \$5 million shared limit
5 of liability, and a shared \$5 million aggregate limit.

6 22. The D&O coverage section of the Policy contains an Additional Limit for
7 Executives Endorsement, which provides:

8 (1) Subject to paragraphs (2) and (3) below, an “Additional
9 Limit for Executives” will be available under the Coverage
10 Section identified above in an amount not to exceed
11 \$1,000,000 in the aggregate, which amount shall be in
addition to, and not part of, the Policy Aggregate Limit of
Liability or any Separate Limit of Liability or Shared Limit
of Liability applicable to the Coverage Section identified
above.

12 (2) The “Additional Limit for Executives” is available solely for
13 Loss resulting from any Claim made against any Executive
covered under Insuring Agreement (A) of the Coverage
Section identified above.

14 (3) The “Additional Limit for Executives” shall be excess of any
15 insurance available that is specifically excess to this Policy
16 and such excess insurance must be completely exhausted by
payment of loss, damages or defense expenses thereunder
before the Underwriter shall have any obligation to make
any payment on account of the “Additional Limit of Liability
for Executives.” All other terms, conditions and limitations
of this Policy shall remain unchanged.

19 23. Form No. MPF-30001-09-10, which is applicable to D&O coverage section and the
20 EPL coverage section of the Policy, contains provisions relating to limits of liability and retentions,
21 including the following:

22 III. LIMITS OF LIABILITY

23 (A) With respect to the Liability Coverage Sections, the

1 following shall apply:

2 (1) Policy Aggregate Limit of Liability

3 The Policy Aggregate Limit of Liability
4 stated in ITEM 4 of the Declarations is the
5 maximum limit of the Underwriter's liability
6 for all Loss under all Liability Coverage
Sections combined resulting from all Claims
or Related Claims for which such Liability
Coverage Sections provide coverage

7 (3) Shared Limits of Liability

8 If a Shared Limit of Liability is stated in
9 ITEM 4 of the Declarations for any Liability
10 Coverage Sections, then such Shared Limit of
11 Liability shall be the maximum limit of the
12 Underwriter's liability for all Loss under all
13 Liability Coverage Sections to which such
14 Shared Limit of Liability is applicable, as
15 indicated in ITEM 4 of the Declarations,
16 resulting from all Claims or Related Claims
17 for which such Liability Coverage Sections
18 provide coverage. Any such Shared Limit of
19 Liability shall be part of, and not in addition
20 to, the Policy Aggregate Limit of Liability
21 stated in ITEM 4 of the Declarations and shall
22 in no way serve to increase such Policy
23 Aggregate Limit of Liability.

24 (4) Defense Expenses are part of and not in
25 addition to the applicable Limits of Liability
26 stated in ITEM 4 of the Declarations, and
27 payment of Defense Expenses by the
28 Underwriter will reduce, and may exhaust,
29 such applicable Limits of Liability.

30 IV. RETENTIONS

31 ...

32 (B) In the event a Claim is covered under more than one
33 Liability Coverage Section, then the following shall
34 apply:

- (1) with regard to Loss resulting from any such Claim payable under any Liability Coverage Section which is subject to a Separate Limit of Liability, the Retention applicable to such Loss, as stated in ITEM 5 of the Declarations, shall apply separately to such Loss, and such Retention shall not be reduced by payments of Loss under any other Liability Coverage Section; and
- (2) with regard to Loss resulting from any such Claim payable under any Liability Coverage Sections which are subject to a Shared Limit of Liability, the highest applicable Retention, as stated in ITEM 5 of the Declarations, shall be deemed the Retention applicable to such Loss.

24. Form No. MPF-30001-09-10, which is applicable to D&O coverage section and EPL coverage section of the Policy contains definitions, including the following:

II. DEFINITIONS . . .

- (B) “Claim” shall have the meaning set forth in the applicable Liability Coverage Section
- (F) “Insured” shall have the meaning set forth in the applicable Coverage Section.
- (G) “Insured Person” shall have the meaning set forth in the applicable Liability Coverage Section.
- (H) “Liability Coverage Section” means the Directors, Officers and Organization Liability, Employment Practices Liability and Fiduciary Liability Coverage Sections of this Policy, if purchased as stated in ITEM 3 of the Declarations.
- (I) “Loss” shall have the meaning set forth in the applicable Liability Coverage Section
- (K) “Named Organization” means the entity designated as such in ITEM 1 of the Declarations

- (M) “Organization” means the Named Organization and, subject to the provisions of Section IX of these General Terms and Conditions, any Subsidiary. Organization shall also mean any such entity as a debtor in possession
- (O) “Policy Aggregate Limit of Liability” means the Policy Aggregate Limit of Liability stated in ITEM 4 of the Declarations
- (S) “Shared Limit of Liability” means the applicable Shared Limit of Liability, if any, stated in ITEM 4 of the Declarations, which limit of liability shall be shared between all Liability Coverage Sections listed below such Shared Limit of Liability in the Declarations
- (U) “Wrongful Act” shall have the meaning set forth in the applicable Liability Coverage Section.

25. The D&O coverage section of the Policy contains additional definitions, including the following:

II. DEFINITIONS

- (A) "Claim" means for purposes of coverage under:
 - (1) Insuring Agreements (A) and (B) of this Coverage Section: any Insured Person Claim
 -
- (B) "Defense Expenses" means reasonable costs, charges, fees (including but not limited to attorneys' fees and experts' fees) and expenses incurred in defending any Claim and the premium for appeal, attachment or similar bonds. Defense Expenses does not include any remuneration, salaries, wages, fees, overhead or benefit expenses of any Insured.
- (C) "Employee" means any employee of the Organization, whether such employee is in a supervisory, co-worker or subordinate position or otherwise, including any part-time, seasonal and temporary employee. Employee also includes:

- (1) any volunteer working for the Organization;
- (2) any individual who is leased to, and working for, the Organization, but only if the Organization provides indemnification to such leased individual in the same manner as is provided to the Organization's employees; and
- (3) any independent contractor working for the Organization, but only if the Organization provides indemnification to such independent contractor in the same manner as that provided to the Organization's employees.

(D) "Executive" means any natural person who was, now is or becomes:

- (1) a duly elected or appointed director, officer, trustee, trustee emeritus, executive director, member of the Board of Managers, duly constituted committee member, in-house general counsel or risk manager of any Organization chartered in the United States of America

(E) "Insured" means the Organization and any Insured Person.

(F) "Insured Person" means any natural person who was, now is or becomes:

- (1) an Executive; or
- (2) an Employee.

(G) "Insured Person Claim" means:

- (1) a written demand for monetary, non-monetary or injunctive relief (including any request to toll or waive any statute of limitations or request for mediation); or
- (2) a civil, criminal, administrative, regulatory or

1 arbitration proceeding for monetary, non-
2 monetary or injunctive relief commenced by:
3

4 (a) the service of a complaint or similar
5 pleading against an Insured
6 Person for a Wrongful Act

7 (I) "Loss" means:

8 (1) for purposes of coverage under Insuring
9 Agreements (A), (B) and (C) of this
10 Coverage Section, Defense Expenses and any
11 monetary amount which an Insured is legally
12 obligated to pay as a result of a covered
13 Claim, including but not limited to:

14 (a) monetary damages (including
15 punitive or exemplary damages, to
16 the extent such damages are insurable
17 under the law of any jurisdiction
18 which has a substantial relationship to
19 the Insureds, this Policy or the Claim
20 giving rise to such damages and
21 which is most favorable to the
22 insurability of such damages);
23 (b) judgments;
24 (c) settlements; and
25 (d) pre- and post-judgment interest

Loss does not include:

(i) any amount not insurable
under the law pursuant to
which this Coverage Section
is construed, except as
provided in paragraph (1)(a)
above with respect to punitive
or exemplary damages;
(ii) civil or criminal fines or
penalties or the multiple
portion of any multiplied

1 damage award, except as
2 provided in paragraph (l)(a)
3 above with respect to punitive
4 or exemplary damages;

5 (iii) taxes or tax penalties (whether
6 imposed by a federal, state,
7 local or other governmental
8 authority);

9 (iv) any costs incurred by the
10 Organization to comply with
11 any order for injunctive or
12 other non-monetary relief, or
13 to comply with an agreement
14 to provide such relief; or

15 (v) any fees, profits, or other
16 revenue lost, or any costs
17 incurred, by an Insured in
18 connection with the
19 termination, suspension or
20 limitation of such Insured's
right to participate in any
program of a federal, state or
local governmental,
regulatory or administrative
agency.

15 . . .
16 (R) "Wrongful Act" means:

17 (1) any actual or alleged act, error, omission,
18 misstatement, misleading statement or breach
19 of duty by any Insured Person in his or her
20 capacity as such, or any matter asserted
against any Insured Person solely by reason
of his or her status as such . . .

21 26. The EPL coverage section in the Policy provides in part:

22 I. INSURING AGREEMENTS

23 (A) Employment Practices Liability Coverage:

1 The Underwriter shall pay, on behalf of the Insureds,
2 Loss from any Employment Claim first made against
3 the Insureds during the Policy Period or applicable
4 Extended Reporting Period, for an Employment
5 Practices Wrongful Act; provided, that such
6 Employment Claim is reported to the Underwriter in
7 accordance with Section VII of this Coverage
8 Section

9
10 V. DEFENSE AND SETTLEMENT

11
12 (A) The Underwriter will have the right and duty to
13 defend any Claim covered under this Coverage
14 Section through counsel of its choice, even if the
15 allegations of such Claim are groundless, false, or
16 fraudulent; provided, that the Underwriter's
17 obligation to defend any Claim covered under this
18 Coverage Section is subject to the applicable
19 Retention and the Underwriter's applicable Limits of
20 Liability stated in ITEM 4 of the Declarations

21
22 (C) The Underwriter will have no obligation to pay Loss,
23 or to defend or continue to defend any Claim, after
24 the Underwriter's applicable Limits of Liability have
25 been exhausted by the payment of Loss.

26
27 27. The EPL coverage section of the Policy contains exclusions, including the
28 following:

29
30 III. EXCLUSIONS

31
32 ...

33
34 (B) This Coverage Section does not apply to, and no
35 coverage will be available under this Coverage
36 Section for, that part of Loss, other than Defense
37 Expenses:

38
39 (1) which constitutes Benefits due or to become
40 due or the equivalent value of such Benefits;
41 provided, that this EXCLUSION (B)(1) shall
42 not apply to any Employment Claim for
43 Wrongful Termination

(3) which constitutes costs of compliance with any order for, grant of or agreement to provide non-monetary relief.

(C) This Coverage Section does not apply to, and no coverage will be available under this Coverage Section for, Loss, other than Defense Expenses, from any Claim for any actual or alleged breach of any written employment contract; provided, that this EXCLUSION (C) shall not apply to the extent that an Insured would have been liable in the absence of such written employment contract.

28. The EPL coverage section of the Policy contains the following exclusion in

Endorsement MPE-34007-02-11:

In consideration of the premium charged:

(1) Section III EXCLUSIONS (A)(4) of the Coverage Section identified above is deleted in its entirety.

(2) Subject to paragraph (3) below, no coverage will be available under the Coverage Section identified above for **Loss**, other than **Defense Expenses**, from any **Claim** for any actual or alleged violation of the responsibilities, duties or obligations imposed under any federal, state or local wage and hour law, including, without limitation, the Fair Labor Standards Act (except the Equal Pay Act); provided, that this Exclusion shall not apply to any **Employment Claim** for **Retaliation**.

[***]

29. The EPL coverage section of the Policy contains provisions relating to allocation, including the following:

VI. ALLOCATION

If both Loss covered by this Coverage Section and loss not covered by this Coverage Section are incurred, either because a Claim made against the Insureds includes both covered and uncovered matters, or because a Claim is made against both Insureds and others not included within the

1 definition of "Insured" set forth in DEFINITION (M) above,
2 then such covered Loss and uncovered loss shall be allocated
3 as follows:

4 (A) one hundred percent (100%) of Defense Expenses
5 incurred by the Insureds in connection with such
6 Claim shall be allocated to covered Loss; and
7
8 (B) all loss, other than Defense Expenses, incurred by the
9 Insureds in connection with such Claim shall be
10 allocated between covered Loss and uncovered loss
11 based upon the relative legal and financial exposures
12 of, and relative benefits obtained in connection with
13 the defense and/or settlement of the Claim by the
14 Insured Persons, the Organization and others. In
15 making such a determination, the Organization, the
16 Insured Persons and the Underwriter agree to use
17 their best efforts to determine a fair and proper
18 allocation of all such amounts. In the event that the
19 Underwriter and the Insureds do not reach an
20 agreement with respect to an allocation, then the
21 Underwriter shall be obligated to make an interim
22 payment of the amount of Loss which the parties
23 agree is not in dispute until a final amount is agreed
upon or determined pursuant to the provisions of this
Policy and applicable law

14
15 30. The EPL coverage section of the Policy is subject a retention of \$100,000 each
16 Employment Claim. The EPL coverage section of the Policy contains the following terms relating
17 to retentions:

18 IV. RETENTIONS

19 The Underwriter's obligation to pay Loss under this
20 Coverage Section shall only be in excess of the applicable
21 Retention stated in ITEM 5 of the Declarations. Such
22 Retention shall only be eroded (or exhausted) by the Insured
23 's payment of Loss otherwise covered under this Coverage
Section, and shall be borne by the Insureds uninsured and at
their own risk. The Underwriter shall have no obligation
whatsoever, either to the Insureds or any other person or
entity, to pay all or any portion of the applicable Retention
on behalf of any Insured. The Underwriter shall, however, at

its sole discretion, have the right and option to do so, in which event the Insureds will repay the Underwriter any amounts so paid

31. The EPL coverage section of the Policy contains definitions, including the following:

II. DEFINITIONS

- (A) “Benefits” means perquisites, fringe benefits, deferred compensation or payments (including insurance premiums) in connection with an employee benefit plan and any other payment to or for the benefit of an employee arising out of the employment relationship. Benefits shall not include salary, wages, Stock Benefits, commissions, or non-deferred cash incentive compensation.
- (B) “Breach of Employment Contract” means any breach of any oral, written or implied employment contract or employment contractual obligation, including but not limited to any contract or contractual obligation arising out of any personnel manual, employee handbook, policy statement or other representation.
- (C) “Claim” means any Employment Claim
- (D) “Defense Expenses” means reasonable costs, charges, fees (including but not limited to attorneys’ fees and experts’ fees) and expenses incurred in defending any Claim and the premium for appeal, attachment or similar bonds. Defense Expenses does not include any remuneration, salaries, wages, fees, overhead or benefit expenses of any Insured.
- (E) “Employee” means any employee of the Organization, whether such employee is in a supervisory, co-worker or subordinate position or otherwise, including any part-time, seasonal and temporary employee. Employee also includes:
 - (1) any volunteer working for the Organization;
 - (2) any individual who is leased to, and working

1 for, the Organization, but only if the
2 Organization provides indemnification to
3 such leased individual in the same manner as
4 is provided to the Organization's employees;
5 and
6

7 (3) any Independent Contractor, but only if the
8 Organization provides indemnification to
9 such Independent Contractor in the same
10 manner as that provided to the Organization's
11 employees.

12 (F) "Employment Claim" means:

13 (1) a written demand for monetary, non-
14 monetary or injunctive relief (including any
15 request to toll or waive any statute of
16 limitations);
17 (2) a civil, criminal or arbitration proceeding for
18 monetary, non-monetary or injunctive relief
19 commenced by:
20 (a) the service of a complaint or similar
21 pleading

22 brought by or on behalf of any past, present
23 or prospective Employee against an Insured .
for an Employment Practices Wrongful
Act

(G) "Employment Discrimination" means any violation
of employment discrimination laws, including any
failure or refusal to hire or promote an Employee,
Outside Entity Employee or applicant for
employment, any modification of any term or
condition of employment, or any limitation,
segregation or classification of any Employee,
Outside Entity Employee or applicant for
employment in any way that would deprive or tend
to deprive such person of employment opportunities
or otherwise affect his or her status as an Employee
or Outside Entity Employee because of such person's
race, color, religion, age, sex, national origin,
disability, pregnancy, HIV status, mental status,

1 genetic information, marital or family status, sexual
2 orientation or preference, military or veteran status,
3 or other status that is protected pursuant to any
 applicable federal, state or local statute, ordinance,
 regulation or common law.

4 (H) "Employment Harassment" means:

5 (1) sexual harassment, including any unwelcome
6 sexual advances, requests for sexual favors,
7 or other conduct of a sexual nature that is
 made a condition of employment with, is
 used as a basis for employment decisions by,
 interferes with performance at, or creates an
 intimidating, hostile or offensive working
 environment within, the Organization or
 Outside Entity; or

10 (2) workplace harassment (i.e., harassment of a
11 non-sexual nature) that interferes with
 performance at, or creates an intimidating,
 hostile or offensive working environment
 within, the Organization or Outside Entity.

13 (I) "Employment Practices Wrongful Act" means any
14 actual or alleged:

15 (1) Breach of Employment Contract;

16 (2) Employment Discrimination;

17 (3) Employment Harassment;

18 (4) Retaliation;

19 (5) Workplace Tort;

20 (6) Wrongful Employment Decision; or

21 (7) Wrongful Termination.

22 (J) "Executive" means any natural person who was, now
23 is or becomes: (1) a duly elected or appointed
 director, officer, trustee, trustee emeritus, executive
 director, member of the Board of Managers, duly

constituted committee member, in-house general counsel or risk manager of any Organization chartered in the United States of America; or

- (K) “Independent Contractor” means any natural person working for the Organization in the capacity of an independent contractor pursuant to an Independent Contractor Services Agreement.
- (L) “Independent Contractor Services Agreement” means any express contract or agreement between an Independent Contractor and the Organization.
- (M) “Insured” means the Organization and any Insured Person.
- (N) “Insured Person” means any natural person who was, now is or becomes:
 - (1) an Executive; or
 - (2) an Employee.
- (O) “Loss” means Defense Expenses and any monetary amount which an Insure is legally obligated to pay as a result of a covered Claim, including but not limited to, damages (including punitive and exemplary damages, liquidated damages awarded pursuant to the Age Discrimination in Employment Act or the Equal Pay Act, or the multiple portion of any multiplied damage award, to the extent such punitive, exemplary, liquidated or multiple damages are insurable under the law of any jurisdiction which has a substantial relationship to the Insureds, this Policy or the Claim giving rise to such damages and which is most favorable to the insurability of such damages), back pay, front pay, claimant’s attorney’s fees awarded by a court against an Insured or agreed to in writing by the Underwriter in connection with a settlement, judgments, settlements, pre-judgment interest and post-judgment interest.

Loss does not include:

(1) the future salary, wages, commissions or

Benefits of a claimant who has been or shall be hired, promoted or reinstated to employment pursuant to a settlement of, order in or other resolution of any Claim;

- (2) taxes, fines, or penalties, except as provided above with respect to punitive, exemplary or liquidated damages or the multiple portion of any multiplied damage award;
- (3) Stock Benefits;
- (4) any amount not insurable under the law pursuant to which this Coverage Section is construed, except as provided above with respect to punitive, exemplary or liquidated damages or the multiple portion of any multiplied damage award; or
- (5) any salary, wages, commissions, Benefits or other monetary payments which constitute severance payments or payments pursuant to a notice period.

(T) "Retaliation" means retaliatory treatment against any Employee or Outside Entity Employee on account of such individual:

- (1) exercising his or her rights under law;
- (2) refusing to violate any law;
- (3) opposing any unlawful practice;
- (4) disclosing or threatening to disclose to a superior or to any governmental agency any alleged violations of law; or
- (5) having assisted or testified in or cooperated with a proceeding or investigation regarding alleged violations of law by any Insured.

(U) “Stock Benefits” means any offering, plan or agreement between the Organization and any Executive or Employee which grants stock or stock

1 options or stock appreciation rights as to the
2 Organization to such individual, including but not
3 limited to stock options, restricted stock or any other
stock grant, but not including employee stock
ownership plans or employee stock purchase plans.

4 (Z) “Workplace Tort” means:

5 (1) any employment-related: defamation, libel,
slander, humiliation, invasion of privacy,
negligent evaluation or wrongful discipline;
or

6 (2) any of the following:

7 (a) employment-related negligent
retention;

8 (b) employment-related negligent
supervision;

9 (c) employment-related negligent hiring;

10 (d) employment-related negligent
training;

11 (e) employment-related negligent or
intentional misrepresentation;

12 (f) employment-related wrongful
infliction of emotional distress,
mental anguish or humiliation; or

13 (g) failure to provide or consistently
enforce employment-related
corporate policies and procedures;

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20 but only when alleged as part of an
21 Employment Claim for any actual or alleged
Breach of Employment Contract,
Employment Discrimination, Employment
Harassment, Retaliation, Wrongful
Termination, Wrongful Employment
Decision or act set forth in paragraph (1)
above.

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(AA) “Wrongful Act” means:

(1) with respect to any past, present or prospective Employee, an Employment Practices Wrongful Act committed or allegedly committed by the Organization or by any Insured Person in his or her capacity as such

(BB) "Wrongful Employment Decision" means any wrongful demotion, denial of tenure or failure or refusal to promote.

(CC) “Wrongful Termination” means any wrongful termination, dismissal, or discharge of employment, including constructive termination, dismissal or discharge. Wrongful Termination does not include Breach of Employment Contract.

32. On or around October 1, 2018, Godden tendered the 2018 Action to Atlantic Specialty for defense and indemnity.

33. On December 12, 2018, Atlantic Specialty agreed to defend Godden under the Policy in the 2018 Action, subject to a reservation of rights.

34. Atlantic Specialty reserved its rights to deny a duty to defend and to pay Loss, and to have a Court determine that there is no duty to defend or pay Loss.

35. Atlantic Specialty seeks a declaration in this action that it does not have a duty to defend or indemnify the defendants in the 2018 Action.

C. The Excess Policy Issued by MAIC

36. MAIC issued to HMS Excess Management Liability Policy Number MKLM5MXM000023 (the “Excess Policy”), with a Policy Period of 02/20/18 to 02/20/19, which has a \$5,000,000 Per Claim and Aggregate Limit of Liability, excess of \$5,000,000, is excess to (and follows form in pertinent part to) Atlantic Specialty’s Policy.

37. MAIC seeks a declaration in this action that no coverage for the 2018 Action is available under the Excess Policy, and that MAIC would have no duty to defend or indemnify the defendants in the 2018 Action under the Excess Policy if Atlantic Specialty's Policy were exhausted.

V. CAUSE OF ACTION

(Declaratory Judgment – No Duty to Continue Defense or Pay Loss)

1. Atlantic Specialty and MAIC reiterate and re-allege each and every allegation contained in the preceding paragraphs, as if fully set forth herein.

2. There is an actual, substantial, and justiciable controversy between Atlantic Specialty on the one hand, and defendants on the other hand, concerning Atlantic Specialty's obligations under the Policy.

3. Atlantic Specialty is entitled to a declaratory judgment that it has no duty to defend the defendants, and no duty to pay Loss to or on behalf of the defendants, under the D&O coverage section of the Policy in relation to the claims in the 2018 Action, including without limitation, for the following reasons:

a. No coverage exists under the D&O coverage part of the Policy for the claims in the 2018 Action based on application of Exclusion III.A.(3)(h) of the Policy, the insured versus insured exclusion, where the suits were brought by Franco, an insured under the Policy, and the exceptions to the exclusion do not apply;

b. No coverage exists under the D&O coverage part for the claims of defamation in the 2018 Action based on the application of Exclusion III.A.(7) to the Policy. Exclusion III.(A)(7) to the Policy eliminates a duty to defend and pay Loss in relation to

1 the claims in the Underlying Action based upon, arising out of, directly or indirectly
2 resulting from, in consequence of, or in any way involving libel, slander, and/or defamation
3 of character;

4 c. In the 2018 Action, Franco and HMS Partners have not alleged that Godden
5 is required to pay Loss as defined under the Policy;

6 d. Exclusion III. (A)(16) of the Policy eliminates any duty to pay Loss in
7 relation to the claims in the 2018 Action for any employment-related Wrongful Act, such
8 as the claims in the “First Cause of Action” for Breach of Fiduciary Duty, “Second Cause
9 of Action” for Breach of Contract, “Third Cause of Action” for Interference with
10 Contractual Relations, and “Fourth Cause of Action” for Intentional Infliction of Emotional
11 Distress;

12 e. The provisions of section VII. ALLOCATION limit or eliminate any duty
13 to pay Loss;

14 f. To the extent that there is any other valid and collectible insurance available
15 to the defendants, the provisions of section IX. OTHER INSURANCE and the other
16 insurance provisions in the Additional Limit for Executives Endorsement limit or eliminate
17 any duty to defend or pay Loss; and,

18 g. The provisions of section III. LIMITS OF LIABILITY and IV.
19 RETENTIONS limit or eliminate any duty to defend and pay Loss to or on behalf of the
20 defendant in relation to the claims in the 2018 Action.

21 4. Atlantic Specialty is entitled to a declaratory judgment that it has no duty to defend
22 the defendants, and pay Loss to or on behalf of defendants, under the EPL coverage section of the
23 Policy in relation to certain claims in the 2018 Action, or at a minimum any obligation is limited

1 to defense only, for the following reasons:

2 a. No coverage exists under the Policy for the 2018 Action because Franco
3 and HMS Partners have not alleged an “Employment Practices Wrongful Act” as defined
4 under the Policy;

5 b. No coverage exists under the Policy for the 2018 Action because Franco
6 and HMS Partners have not alleged that any defendant is required to pay Loss as defined
7 under the Policy;

8 c. No coverage exists under the EPL coverage part of the Policy for the 2018
9 Action by application of Exclusion III.(B)(1) of the EPL coverage part of the Policy that
10 limits or eliminates any duty to pay Loss, other than Defense Expenses, which constitutes
11 Benefits due or to become due, or the equivalent value of such Benefits;

12 d. No coverage exists for the claims in the 2018 Action under the EPL
13 coverage part of the Policy by application of Exclusion III.(B)(3) that limits any duty to
14 pay Loss, other than Defense Expenses, which constitute costs of compliance with any
15 order for, grant of or agreement to provide non-monetary relief;

16 e. No coverage exists for the claims in the 2018 Action under the EPL
17 coverage part of the Policy by application of Exclusion III.(C) that limits or eliminates any
18 duty to pay Loss, other than Defense Expenses, in relation to any Claim for any actual or
19 alleged breach of any written employment contract, except to the extent that an insured
20 would have been liable in the absence of such written employment contract;

21 f. The provisions of Section VI. ALLOCATION limit or eliminate any duty
22 to pay Loss; and,

23 g. The provisions of section III. LIMITS OF LIABILITY and IV.

1 RETENTIONS limit or eliminate any duty to defend or pay Loss.

2 5. MAIC is entitled to a declaration in this action that no coverage for the 2018 Action
3 is available under the Excess Policy, and that MAIC would have no duty to defend or indemnify
4 the defendants in the 2018 Action under the Excess Policy if Atlantic Specialty's Policy were
5 exhausted.

6 **VI. PRAYER FOR RELIEF**

7 WHEREFORE, Atlantic Specialty and MAIC pray for the following relief:

8 1. A declaratory judgment that Atlantic Specialty has no duty to defend Godden in the
9 2018 Action, as set forth above.

10 2. A declaratory judgment that Atlantic Specialty has no duty to pay Loss (including
11 Defense Expenses) to, or on behalf of, Godden in relation to the claims asserted in the Underlying
12 Action, as set forth above.

13 3. A declaratory judgment that any obligation to defend Godden in the 2018 Action
14 ends once the Court holds that Atlantic Specialty has no duty to defend, and that Atlantic Specialty
15 is entitled to recover all defense costs, fees, and expenses that it paid to, or on behalf of, Godden,
16 to the extent permitted by the Policy and applicable law.

17 4. A declaratory judgment that no coverage for the 2018 Action is available under the
18 Excess Policy, and that MAIC would have no duty to defend or indemnify the defendants in the
19 2018 Action under the Excess Policy if Atlantic Specialty's Policy were exhausted.

20 5. For such further relief as the Court deems just, proper, and equitable.

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1 DATED this 13th day of September, 2021.

2 FORSBERG & UMLAUF, P.S.

3 s/ Ryan J. Hesselgesser

4 Ryan J. Hesselgesser, WSBA #40720

5 s/ Sally A. Clements

6 Sally A. Clements, WSBA #54502

7 901 Fifth Ave., Suite 1400

8 Seattle, WA 98164

9 Phone: (206) 689-8500

10 Email: rhessegesser@foum.law

11 Email: sclements@foum.law

12 Attorneys for Plaintiff Atlantic Specialty
13 Insurance Company

14 WILSON SMITH COCHRAN DICKERSON

15 s/ John M. Silk

16 John M. Silk, WSBA #15035

17 s/ Lisa C. Neal

18 Lisa C. Neal, WSBA #25686

19 901 Fifth Ave., Suite 1700

20 Seattle, WA 98164

21 Phone: (206) 623-4100

22 Email: silk@wscd.com

23 Email: l.neal@wscd.com

16 KAUFMAN BORGEEST & RYAN LLP

17 s/ Michael F. Perlis

18 Michael F. Perlis, *Pro Hac Vice Pending*

19 s/ Richard Johnson

20 Richard Johnson, *Pro Hac Vice Pending*

21 21700 Oxnard St., Suite 1450

22 Woodland Hills, CA 91367

23 Phone: (818) 880-0992

Email: mperlis@kbrlaw.com

Email: rjohnson@kbrlaw.com

Attorneys for Plaintiff Markel American
Insurance Company